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Supreme Court, U.S.
FILED
MAR 8 1995
OFFICE OF THE CLERK

No. 94-1335

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

STATE OF ARIZONA,

PETITIONER,

-vs-

SHIRLEY AVERYT and ROBERT AVERYT,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

BRIEF OF AMICUS CURIAE FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Arizona Court of Appeals err, as a matter of federal constitutional law, by holding that due process required the state to prove the defendants knew they had a duty to file a state income tax return?

2. Did the Arizona Court of Appeals err, as a matter of federal constitutional law, by holding that the defendants must be permitted to present a "good faith" defense in a prosection for failure to file a state income tax return.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	8
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: Page

California v. Freeman,
488 U.S. 1311 (1989) 12

Cheek v. United States,
498 U.S. 192 (1991) 10

Coleman v. Thompson,
111 S. Ct. 2456 (1991) 11, 12

Herb v. Pitcairn,
324 U.S. 117 (1945) 10, 11, 13

In re Winship,
397 U.S. 358 (1970) 13

Lambert v. California,
355 U.S. 225 (1957) 10

Michigan v. Long,
463 U.S. 1032 . . . . . 13, 14

Constitutional Provisions:

U.S. Const. amend. VI 1, 6

U.S. Const. amend. XIV 1

Statutes:

28 U.S.C. § 1257 . . . . . 1, 11

Ariz. Rev. Stat.
§ 42-137(B)(4) 1, 4, 7

STATEMENT OF JURISDICTION

The discretionary jurisdiction of this Court to review the opinion of the Arizona Court of Appeals has been invoked pursuant to 28 U.S.C. § 1257. As set forth below, it is the position of amicus curiae that the Court lacks jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process of law to an Arizona criminal tax statute which penalizes the knowing failure to file a state income tax return.

STATUTE INVOLVED

Ariz. Rev. Stat. § 42-137(B)(4) makes it "a class 5 felony to . . . knowingly fail to file a [state income tax] return."

STATEMENT OF THE CASE

Respondents were indicted by a state grand jury on September 16, 1991, for failure to file state income tax returns

for the years 1987 through 1989. At their jury trial, the respondents sought to introduce evidence that they believed their duty under the tax laws was to file complete and accurate returns, even if it meant that the returns would not be filed timely. The trial court granted a motion in limine by the state and excluded evidence of respondents' flawed understanding of the law.

The jury was instructed that the crime of failing to file an Arizona income tax return required the state to prove only that:

> 1. A defendant earned at least $5,000 gross income in Arizona in one tax year; and
>
> 2. The defendant failed to file an Arizona personal income tax return by April 15th of the year following the tax year; and

3. The failure to file an Arizona personal income tax return was done knowingly.

The state is not required to show the tax is due and owing to prove this offense.

The trial court defined "knowingly" for the jurors as follows:

> Knowingly means that the defendant acted with awareness of the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known the conduct is forbidden by law.

The jury returned verdicts of guilty on all three counts against both respondents. Respondents appealed from their convictions to the Arizona Court of Appeals.

Arizona Attorneys for Criminal Justice filed an amicus brief on appeal which raised only one issue:

> Is the defense of a good faith misunderstanding of the law available to one charged with the criminal offense of failing to file a tax return in violation of Ariz. Rev. Stat. § 42-137(B)(4)?

The state's position on appeal, as at trial, was that a good faith misunderstanding of the tax law is not a defense and the state's criminal tax statute does not require the state to prove that the respondents intentionally violated a known legal duty.

The court of appeals filed an opinion on March 8, 1994, reversing the convictions and remanding for a new trial. The court of appeals, however, declined to decide the matter based upon federal law and instead found that Arizona law required reversal. The court stated:

> The state contends that Arizona law, unlike federal law, does not require the state to prove that the Averyts knew of their legal duty to file a tax return but only that they knew they had failed to file a particular return. We disagree. We need not rewrite the statute, however, nor attempt to harmonize it with a dissimilar federal provision as the Averyts and *amicus curiae* have urged us to do.

(Appendix to Petition at A-16.)

Rather than adopting the federal criminal tax defense of a good faith misunderstanding of the law, the court held that, according to Arizona law, in order for an omission to act to be a crime, there must exist a duty to act imposed by law, and based upon Arizona precedent, "in cases of wholly passive conduct, arising only from a duty imposed by statute, the defendant's knowledge of that statutory duty must be established." (Appendix to Petition at A-17.) The court held that a conviction of the Arizona crime of failure to file a

state income tax return cannot be sustained without proof of the defendant's knowledge of his duty to file such return. The court found the jury instruction to be incomplete and incorrect because the jury was not told that the element of knowledge applied to both the element of failure to file and the element of the duty to file.

As a corollary to the court's holding that conviction of a failure to file tax returns required proof of knowledge of the duty to file, the court of appeals directed that, upon a retrial of the case, respondents must be allowed to present evidence in support of the defense that their knowledge of the duty to file tax returns was flawed. (Appendix to Petition at A-20.) The court held that "preventing the jury from considering such evidence would seriously undermine the protections embodied within the sixth amendment's jury trial provision." (Id.)

The state petitioned the Arizona Supreme Court for a review of the Court of Appeals' opinion. In its brief in opposition to review, amicus characterized the issues as:

> 1. Does a conviction under Ariz. Rev. Stat. § 42-137(B)(4) for filing to file a tax return require proof both that the defendant had knowledge that no return was filed and that the defendant had knowledge of the duty to file the return?
>
> 2. Should a defendant be allowed to present evidence in support of his defense that his knowledge of his duty to file a tax return was flawed?

After granting review and hearing oral argument by counsel for the state, respondents and amicus, the Arizona Supreme Court dismissed the state's petition for review

as improvidently granted. (Appendix B to Petition.)

SUMMARY OF ARGUMENT

This court's only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. The Court's power is to correct wrong judgments, not to revise opinions. The Court is not permitted to render an advisory opinion. The rights of respondents were correctly decided by the Arizona Court of Appeals based upon Arizona law and precedent.

ARGUMENT

This is not a case in which the decision of a state court has deprived citizens of a right secured by the United States Constitution. Rather this is a case in which the highest state court to hear respondent's appeal upheld respondents' interpretation of a state statute, noting that a contrary interpretation which did

not require the state to prove the defendants' knowledge of their duty to file would violate fundamental constitutional rights. The Arizona Court of Appeals simply recognized the constitutional protections granted to all citizens by the United States Constitution.

The state asks this Court to accept jurisdiction for the purpose of finding that notice is not ingrained in the notion of due process and that respondents' knowledge of their statutory duty need not be established in order to sustain a conviction of failure to file a tax return.

In reaching its opinion, the Arizona Court of Appeals analyzed the state tax laws in general and the provisions governing criminal violations of the tax law in particular, including the applicable *mens rea*. (Appendix to Petition at A-5 to A-16.) The court's analysis of the scienter requirement of the state's failure to file

statute rested upon decisions of the Arizona courts and the legislative history of Arizona's criminal tax statutes. (Id.) The court's references to Lambert v. California, 355 U.S. 225 (1957), and Cheek v. United States, 498 U.S. 192 (1991), in finding that, as a corollary of the state's burden to establish respondents' knowledge of their statutory duty, the jury instruction on the elements of the crime was incomplete (Appendix to Petition at A-15 to A-21) were offered only as additional support for findings based on decisions of the Arizona courts, and not as a basis for the court's opinion.

This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). The Court's "power is to correct wrong judgments, not to revise opinions." Id. The Court is "not permit-

ted to render an advisory opinion . . . ." Id.

Certiorari jurisdiction over decisions from state courts pursuant to 28 U.S.C. § 1257 is only exercised when the state court based its decision solely upon a question of federal law, not when the state court decision rests upon a state law ground independent of the federal question. Coleman v. Thompson, ___ U.S. ___, 111 S. Ct. 2546, 2553-54 (1991).

> Because this court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Id. at 2554, citing Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

This principle of refraining from issuing, in essence, advisory opinions to state courts holds true even were a separate federal constitutional basis is of-

fered by the state court in its opinion. California v. Freeman, 488 U.S. 1311, 1312-13 (1989). No specific language needs to be followed or express statement made. Coleman v. Thompson, ___ U.S. ___, 111 S. Ct. at 2558-59. In the absence of a clear indication that a state court rested its decision on federal law, the United States Supreme Court will not review the decisions of state courts. Id. at 2559.

In the instant case, the Arizona Court of Appeals has interpreted the Arizona statute at issue as requiring "the state to prove that the [respondents] knew of their legal duty to file a tax return" and "that they knew they had failed to file a particular return." (Appendix to Petition at A-16.) The Arizona court has determined the elements of an Arizona criminal statute. Citing to Arizona case law, the Arizona Court of Appeals held that a jury instruction "that omits an element of the offense

charged is not 'substantially free from error,' and cannot be said to have properly reflected the law. (Id. at A-19.)

In view of this Court's holding in In re Winship, 397 U.S. 358, 364 (1970), that the due process clause protects a defendant against conviction for a criminal offense "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," the Court cannot find the state court's reversal of respondents' convictions to be a "wrong judgment." That being the case, this Court's review "could amount to no more than an advisory opinion." Herb v. Pitcairn, 324 U.S. at 126.

The apparent fashioning of a new rule of presumptive jurisdiction over the decisions of sovereign states which involve a right secured by the United States Constitution or a federal statute in Michigan v. Long, 463 U.S. 1032 (1983), does not man-

date jurisdiction in this case. The decision of the Arizona Court of Appeals offends no federal interest whatever. "Such cases should not be of inherent concern to this Court." Id. at 1068 (J. Stevens dissenting). The jurisdiction of this Court to review decisions of the state courts should be reserved for cases where a federal right has been denied.

CONCLUSION

For all of the above reasons, amicus requests this Court to deny the certiorari petition of the State of Arizona.

Respectfully submitted.

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